APR 20 1926

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1925.

No. 1[redacted]57

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Petitioner,

vs.

WELLS DICKEY TRUST COMPANY, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF ELMER E. ANDERSON, DECEASED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

AND

BRIEF IN SUPPORT THEREOF

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Summary of Argument

I. Under the Federal Employers' Liability Act, Anderson's mother was the only person for whom a cause of action accrued at the time of his death. The sister was excluded

II. No suit was brought on the cause of action which accrued to the mother. The sister never had any right or interest in that cause of action. A new cause of action in favor of the sister could not arise by the death of the mother. Rights of beneficiaries must accrue at the time of the death of the employee or not at all

III. The opinion of the Supreme Court of Minnesota is not only in conflict with "the Numerical Weight of Authority," as it admits, but entirely disregards the meaning and effect of the words "if none" in the Act

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IN THE

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CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Petitioner,

vs.

WELLS-DICKEY TRUST COMPANY, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF ELMER E. ANDERSON, DECEASED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

I.

STATEMENT OF MATTER INVOLVED.

Your petitioner, Chicago, Burlington & Quincy Railroad Company, respectfully represents that the Supreme Court of the State of Minnesota has affirmed a judgment of Five Thousand and Eight Dollars and Ninety-eight Cents ($5,008.98) against petitioner, and in favor of respondent, in above entitled suit under the Federal Employers' Liability Act, for damages resulting from the death of Elmer E. Anderson, a fireman on petitioner's interstate train, who was instantly killed in a collision November 1, 1920. (R. 23-9, R. 112; 159 Minn. 417, 199

N. W. 101; Minn. ; adv. sheets, Northwestern Reporter, Vol. 207, p. 186.)

The facts are not in dispute. The controversies in the case are regarding the construction of that part of the Employers' Liability Act which provides that a railroad shall be liable, in case of the death of an employe, to his personal representative "*for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe.* * * *"

Elmer E. Anderson, the deceased, left no widow, child or father, but he was survived by his mother and by his brothers and sister. (R. 23.) It is undisputed that under the statute, on the death of Anderson, a cause of action accrued for the sole benefit of his surviving mother. (R. 29.)

March 14, 1921, four months after Anderson was killed, an administrator was appointed on his estate by the District Court of Union County, Iowa, where he lived and where his death occurred. (R. 10.) No suit was brought by this administrator for the benefit of the mother. (R. 29.)

May 5, 1921, six months after Anderson's death, his mother died. (R. 10.) Up to the time of her death no action had been brought on the cause of action created by the statute for her benefit. (R. 29.)

December 27, 1921, more than a year after Anderson's death, the Wells Dickey Trust Company of Minneapolis, Minnesota, was appointed by a Minnesota court as "special administrator" of the estate of Elmer E. Anderson, deceased (R. 18), and as such "special administrator" brought this suit in the District Court, Hennepin County, Minnesota, under the Federal Employers' Liability Act,

for damages for the death of Elmer E. Anderson, for the *benefit of the sister* (R. 6-10).

On motion of petitioner (R. 14, 15) the Trial Court dismissed the suit (R. 15), holding that at the time Elmer E. Anderson was killed, his mother was the only person for whose benefit an action could be brought under the Federal Employers' Liability Act, and, that as no such action had been brought for her benefit, a suit under the Federal Act, for his death, could not be maintained after her death, for the benefit of a dependent sister who had had no right under the statute at the time of his death. (R. 18).

From a judgment dismissing the case (R. 14), the administrator appealed to the Supreme Court of Minnesota, which Court reversed the judgment and held that the administrator might recover for the benefit of a dependent sister, regardless of the death of the mother. (R. 22-30, 159 Minn. 417, 199 N. W. 101). Justice Quinn dissented, stating that in his opinion, a surviving dependent relative must acquire rights under the Federal statute at the time of the death of the employe, or not at all. (R. 29.)

On transcript of this judgment of reversal by the Supreme Court (R. 30) the case was again tried in the District Court of Hennepin County. (R. 32 *et seq.*) Evidence was offered to show that the sister, an able-bodied woman, thirty-three years of age (R. 44) and of considerable business experience, had supported herself in clerical positions in the City of Chicago from 1910 to 1917, earning twenty-eight dollars ($28.00) or more a week (R. 70-76); that in 1917 the mother was in poor health and in need of care and the deceased Elmer E. Anderson, had gone to Chicago and persuaded the sister to return home to take care of her

mother and their home, by promising to pay her more money than she could earn in Chicago (R. 98-9). The sister testified that pursuant to this agreement she returned to the family home in Iowa, cared for her mother, and ran the household, the brother furnishing the money, and also paying her fifteen or twenty dollars per week (R. 55), paid semi-monthly (R. 56), as compensation for the services rendered her mother and brother (R. 61). It was conceded that if she had continued working in Chicago he would not have paid her anything (R. 62.) After the deaths of the mother and brother the sister returned to work in Chicago, where she was employed at the time of the trial. (R. 69.)

Petitioner contended that this bargain made by the sister, as consideration for her return home to keep house and care for her aged mother, was no more than a contract with her brother, such as might have been made with any competent housekeeper, and which his death terminated, and that such evidence did not establish dependency, within the meaning of the Federal Employers' Liability Act. (R. 77.)

The Trial Court overruled this contention of petitioner and the motions raising the point (R. 91), although stating that the question was not free from doubt (R. 100). Throughout the second trial petitioner again objected, by apt motions and exceptions (R. 43, 77, 89-91), to the maintenance of the suit for the benefit of the sister, because the right of action had vested in Anderson's mother at his death and was not transferred to the sister. Under the decision of the Supreme Court of Minnesota the Trial Court overruled all such objections and motions of petitioner. (R. 44, 91.) The case was submitted to a jury; there was a verdict for plaintiff and a judgment thereon, amounting, including interest and costs, to Five Thou-

sand and Eight Dollars and Ninety-eight Cents ($5,008.98). (R. 102.)

From this judgment petitioner appealed to the Supreme Court of Minnesota, assigning error on both points (R. 104, 77 and 89-90). The Court affirmed the judgment in an opinion filed January 29, 1926 (R. 106, Minn. , 207 N. W. Reporter advance sheets, p. 186), holding that the evidence of dependency was sufficient under the Federal Act and referring to its former opinion as disposing of the point that the mother's right of action was not transferred to the sister. On rehearing, the Supreme Court of Minnesota filed a *per curiam* opinion February 19, 1926 (R. 112, 207 N. W. Reporter advance sheets, p. 188) stating that the last mentioned point had been reconsidered but that the Court adhered to its former decision that the suit might be maintained for the benefit of the sister, notwithstanding the survival and subsequent death of the mother, who had been the sole beneficiary, and affirmed the judgment (R. 112).

Assignment of Errors.

On appeal from the judgment of the District Court of Hennepin County, your petitioner, by proper assignments, contended that reversible error was committed by the District Court in entering judgment because the suit could not be maintained for the benefit of the sister, after the cause of action had accrued to the mother under the Federal Act, and also because the evidence did not establish dependency within the meaning of the statute. (R. 104, 77 and 89-90.)

Petitioner respectfully represents that the Supreme Court of Minnesota, in affirming the judgment of the District Court, committed the same errors as did the District Court.

II.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT OF CERTIORARI.

Your petitioner respectfully submits that the Supreme Court of the State of Minnesota has decided in this case two Federal questions of substance, not heretofore determined by this court, to wit:

1. That a right of action under the Federal Employers' Liability Act accrued to a beneficiary of a succeeding class upon the death of a beneficiary of a preferred class, for whose exclusive benefit the cause of action existed at the time of the death of the employee.

2. That the evidence, which showed a mere contract of employment between a deceased railway employee and his sister, is sufficient proof of dependency, within the meaning of the Federal Employers' Liability Act.

Petitioner respectfully calls attention to the statement of the Supreme Court of Minnesota (R. 24) that this question of the right of a remote beneficiary under the Federal Employers' Liability Act has not been decided by either a Federal or State court, and the statement of the Supreme Court of Minnesota (R. 111) that the court's attention had not been called to any case directly in point on the question whether the relations between the deceased employee and his sister were sufficient to establish dependency under the Federal Act.

Petitioner respectfully submits that the wide application of the Federal Employer's Liability Act, governing liability for a large proportion of the deaths of railroad employees in the country, makes it of great importance for this Court to construe the provisions of said Act here in question, so that same may be clearly understood and uniformly enforced.

III.

PRAYER.

Your petitioner now prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Minnesota, and the Justices thereof, commanding the said court to certify and send to this court a full and complete record of the transcript and all the proceedings of said Supreme Court of the State of Minnesota in this cause entitled *Wells Dicken Trust Company as Special Administrator of the Estate of Elmer E. Anderson, deceased, respondent* v. *Chicago, Burlington & Quincy Railroad Company, appellant*, No. 23948 and No. 24936 on the docket of said Supreme Court of the State of Minnesota, to the end that this cause may be reviewed and determined by this court.

And your petitioner prays that the certified copy of the record and proceedings of said Supreme Court of the State of Minnesota, which is filed as a part of and as an exhibit to this petition, may be treated as a return to said writ of certiorari, and your petitioner prays that it may have such other and further remedies and relief in the premises as to this court may seem appropriate and in conformity with law; and that the judgment of said Supreme Court of the State of Minnesota in this case, and every part thereof, be reversed by this Honorable Court, and your petitioner will ever pray, etc.

This is the first application for writ of certiorari in this cause.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

By _____

Attorneys for Petitioner.

Of Counsel.

J. C. JAMES, being duly sworn, makes oath that he is attorney for petitioner in the above cause and that he has prepared the foregoing petition and that the allegations therein are true as he verily believes.

Subscribed and sworn to before me this 25th day of April, 1926.

Notary Public.

In my opinion the foregoing petition is well founded in law.

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WELLS DICKEY TRUST COMPANY, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF ELMER E. ANDERSON, DECEASED,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

OFFICIAL REPORTS OF THE OPINIONS DELIVERED IN THE COURT BELOW.

Opinion filed May 29, 1924, reported 159 Minn. 417; 199 N. W. Rep. 101. (R. 22-31.)

Opinion filed January 29, 1926, reported ... Minn. ; 207 N. W. Rep. Adv. Sheets 186. (R. 106-111.)

On rehearing *per curiam* opinion filed February 19, 1926, reported 207 N. W. Adv. Sheets p. 188. (R. 112.)

Grounds on Which Jurisdiction of This Court Is Invoked.

1. The date of the judgment of the Supreme Court of Minnesota to be reviewed.

The opinion of the Supreme Court of Minnesota affirming judgment of the District Court, was filed January 29, 1926 (R. 106), and supplemented by *per curiam* opinion filed February 19, 1926 (R. 112), although the date of the judgment is February 10, 1926. (R. 113.)

2. The specific claims advanced, and rulings made in the lower court which are relied upon as a basis of this court's jurisdiction.

Order of Trial Court in first trial sustaining petitioner's motions for dismissal and judgment on the ground that there could be no recovery in favor of the sister because the mother was the only person for whose benefit an action might have been brought at the time plaintiff's intestate was killed. (R. 18.)

Reversal of the judgment by the Supreme Court of Minnesota on the ground that the Trial Court had improperly construed said Employers' Liability Act. (R. 22-29.)

Respondent's motions at the opening and close of the evidence in the second trial, for dismissal and directed verdict in its favor on the ground that under the complaint and admitted facts plaintiff had failed to establish a cause of action, because it appeared that deceased left a mother, a member of the second class of beneficiaries under the Federal Act; that the parties were engaged in interstate commerce and were governed by the Federal Act; that de-

ceased left no wife or children; that the mother survived him and the cause of action vested in her, and that when she died in May, 1921, the cause of action died with her. And on the further ground that plaintiff failed to show any dependency within the purview of the Federal Act. (R. 43, 77.) Which motions were denied by the Court and petitioners excepted. (R. 44, 77.)

Petitioner's motion to set aside the verdict of the jury and enter judgment in favor of defendant notwithstanding the verdict, because the verdict was not justified by the evidence, was contrary to law and because the Court should have granted defendant's motion for a directed verdict in its favor made at the close of all the evidence. (R. 89-90.) Order denying said motion. (R. 91.)

Assignments of error for denial of these motions. (R. 104.)

Opinion of the Supreme Court of Minnesota filed January 29, 1926, holding that the evidence of the relation of the sister and the deceased employee was sufficient in law to establish dependency under the Federal Employers' Liability Act. (R. 106.)

Per curiam opinion of the Supreme Court of Minnesota, on rehearing, filed February 19, 1926, as follows:

> "One ground of the defendant's motion for a directed verdict was that the sister of the decedent was not a beneficiary under the statute, his mother living at his death, but dying before action brought, and that the action could not be maintained; and error is assigned in the denial of such motion and the motion for judgment notwithstanding the verdict.
>
> The question was considered on the former appeal and is again pressed by the defendant. We hold that the sister was a beneficiary within the federal act, and that there could be a recovery if she was in fact a dependent. So far as we are ad-

vised, but one case, *Kerner* v. *Trans Mississ*
Terminal R. Co. 158 La. 853, 104 So. 740, involvin
similar statute, has arisen since. The conclus
there reached is not in harmony with that adop
by us.

The contention of the defendant has been con
ered again on this appeal, we adhere to the deci
made on the former one, and the judgment is
firmed." (R. 112.)

3. STATUTORY PROVISION UNDER WHICH THIS COURT'S JU
DICTION IS INVOKED.

Sec. 237 (b) of the Judicial Code, as amended F
ruary 13, 1925, (Chap. 229, Laws 68th Cong. 2nd S
sion).

4. CASES BELIEVED TO SUSTAIN THE JURISDICTION OF T
COURT.

Reading Company v. *John L. Koons*, in which
court granted writ of certiorari to the Supreme Co
of Pennsylvania, January 5, 1925 (266 U. S. 600). D
sion of this court reversing the Supreme Court of Pe
sylvania on construction of Federal Employers' Liabi
Act, filed April 12, 1926.

Minneapolis, St. P. & S. S. M. R. Co. v. *Ernest*
Gotsch, writ of certiorari to the Supreme Court of
State of Minnesota granted June 9, 1924 (265 U. S. 5
Decision of this Court, affirming judgment of the
preme Court of Minnesota construing the Federal E
ployers' Liability Act and the Safety Appliance
filed January 4, 1926.

STATEMENT OF THE CASE.

Petitioner respectfully refers to "Statement of M
ter Involved," set forth in the foregoing Petition

Certiorari, pages 1 to 5, which statement of the case is incorporated herein by reference.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE ARGUED.

1. The Supreme Court of Minnesota erred in holding that this suit might be maintained for the benefit of the sister notwithstanding the fact that the mother was living at the time of Anderson's death, and, therefore, sole beneficiary under the Act.

2. The Supreme Court of Minnesota erred in holding that the evidence, showing a mere contract of employment between plaintiff's intestate and his sister, was sufficient proof of dependency under the Federal Employers' Liability Act.

ARGUMENT.

I.

UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT, ANDERSON'S MOTHER WAS THE ONLY PERSON FOR WHOM A CAUSE OF ACTION ACCRUED AT THE TIME OF HIS DEATH. THE SISTER WAS EXCLUDED.

The statute is as follows:

> "SECTION 1. Every common carrier by railroad while engaged in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, *or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee*," etc. (35 Stat. L. 65; 36 Stat. L. 291.)

Anderson left no widow, child or father; the mother, as the only surviving parent, was the sole beneficiary under the statute. The brothers and sister were excluded. It is conceded by respondent, and the Supreme Court of Minnesota, that the sister for whom judgment has been given in this case, had no right to or interest in the cause of action for Anderson's death *at the time his death occurred and the cause of action thereon accrued to the mother.*

The Supreme Court of North Carolina said, in the case *In re Stone*, 173 N. C. 208, 91 S. E. 852:

> "The Federal Employers' Liability Act provides

that the action shall be brought by the personal representative of deceased employee 'for the benefit (1) of the surviving widow, or husband and children of such employee; and, if none, then (2) of such employee's parents, and, if none, then (3) of the next of kin dependent upon said employee'; the said Federal statute thereby creates three classes which are separate and distinct from the other. If there is any member of the first class, the other two are excluded. If there is none of the first class, but one or more of the second, then the third class will be excluded. If any member of the last class does not come under the provision 'dependent upon such employee' (*Allen J. Dooley* v. *R. R.*, 163 N. C. 454, L. R. A. 1916 E., 185), then such person is excluded from that class, and if such exclusion should apply to the whole of that class, then there can be no recovery."

In *Taylor* v. *Taylor*, 232 U. S. 363, the Court held that a widow is entitled to the entire amount recovered for death of her husband, in an action under the Federal Act, to the exclusion of his parent.

It is equally well settled that the action given by the statute is not for the benefit of the estate of the deceased employee. (*Louisville & N. R. Co.* v. *Stewart*, 241 U. S. 261.)

II.

NO SUIT WAS BROUGHT ON THE CAUSE OF ACTION WHICH ACCRUED TO THE MOTHER. THE SISTER NEVER HAD ANY RIGHT OR INTEREST IN THAT CAUSE OF ACTION. A NEW CAUSE OF ACTION IN FAVOR OF THE SISTER COULD NOT ARISE BY THE DEATH OF THE MOTHER. RIGHTS OF BENEFICIARIES MUST ACCRUE AT THE TIME OF THE DEATH OF THE EMPLOYEE, OR NOT AT ALL.

Anderson was killed Nov. 1, 1920; his mother died May 14, 1921; during her lifetime no suit was brought

on the cause of action for her benefit. The respondent was appointed "special administrator" of Anderson's estate Dec. 27, 1921, and brought this suit, not for the benefit of the mother, not for the benefit of the estate of the mother on account of damages sustained prior to her death, and not on the cause of action which had accrued when Anderson was killed, but on another cause of action, a supposed new cause of action for the benefit of the sister.

The sister had no interest in the cause of action at the time Anderson was killed. She had no interest in it during the life of her mother. Surely the death of the mother could not give the sister rights not conferred by the Federal Statute. The decision of the Minnesota Court is, in effect, that on the death of the mother a new cause of action arose in favor of the sister. Such interpretation of the Federal Statute disregards and nullifies the controlling words "*or none*." It is not the death of the mother which gives the cause of action; it is the death of the employee. Under the Statute, the rights of beneficiaries must accrue at the time of the death of the employee, or not at all.

We have been unable to find any decision of this or any other court, in which the claim of a remote beneficiary, under the Federal Employers' Liability Act, as in this case, has been passed upon. However, there are a number of authoritative and well reasoned state court decisions, and one Federal Court decision by Justice Lurton, then Circuit Judge, construing state statutes which have like provisions.

Probably the leading case is *Woodward v. Chicago & Northwestern R. Co.* 23 Wis. 400, an action by an administrator for the benefit of a surviving husband, for damages resulting from the death of his wife

Sometime after the suit was commenced the husband died. The court held that upon the death of the wife the right of action, by statute, vested solely and exclusively for the benefit of her husband; that he alone was entitled to the amount recovered; that the lineal descendants of deceased had no interest whatever in the action, and that the action could not be prosecuted for the benefit of an infant child. The court said, p. 403:

> "With respect to the persons to be benefited by the money recovered in an action of this nature, the statute of this state differs materially from that of New York, and from the English statute, 9th and 10th Victoria, chapter 93. The New York statute provides, that 'the amount recovered shall be for the exclusive benefit of the widow and next of kin, and shall be distributed in the proportions provided by law in relation to the distribution of personal property left by an intestate.' The English statute declares, 'that every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused.' The statute of this state reads as follows: 'And the amount recovered shall belong and be paid over to the husband or widow of such deceased person, if such relative survive him or her; but if no husband or widow survive the deceased, the amount recovered shall be paid over to his or her lineal descendants, and to his or her lineal ancestors in default of such descendants; and in every action the jury may give such damages, not exceeding five thousand dollars, as they shall deem fair and just in reference to the pecuniary injury resulting from such death to the relations of the deceased specified in this section.' By all the statutes, the action must be brought in the name of the personal representative of the deceased—that is, the executor or administrator. Now, while it is apparent, under the English and New York statutes, that the right of action vests at once for the benefit of each and all of the persons entitled to receive any part of the money recovered, and may be maintained so long as any one of such persons survives, it is equally apparent by our stat

ute, that it vests only for the benefit of the husband or widow, in case the deceased leaves such surviving relative; and if no such relative survives at the time of the death, the action may be prosecuted for the benefit of the lineal descendants of the deceased; and in default of these, then for the benefit of his or her lineal ancestors. * * *

"The position that the action does not abate because the nominal plaintiff, the administrator, still lives and is ready and willing to prosecute it, seems scarcely worthy of serious thought. The administrator is a mere trustee, so made by the statute, with power to sue for the benefit of his *cestui que trust*, or the person beneficially interested. He has no right except in virtue of the right of the real party in interest, and if the right of that party is lapsed or lost, so that no recovery can be had upon it, it follows that the action can be no longer maintained. As already observed, whether there is a person in being entitled, under the statute, to the money recovered, and whom the administrator represents, is one of the facts in issue, which must be proved before any recovery can be had. It appears that the person so entitled died, and that the right of action expired with him; and for that reason, if for no other, the judgment of nonsuit must be affirmed."

Another leading case is *Bean* v. *L. & N. R. Co.* 94 Tenn. 388, 29 S. W. 370, an action by an administrator to recover damages for the benefit of a widow, under the statute of Tennessee, which at that time provided that a right of action for wrongful death should pass to decedent's widow, or his personal representative for the benefit of his widow, *or, if there is no widow, for the benefit of his next of kin.* After trial of the case and appeal to the Supreme Court of Tennessee, the widow for whose benefit the suit was brought died, and defendant moved to abate the suit on account of her death. The Supreme Court said, page 371, that the question presented by this motion was whether the right of action is *limited to those entitled to the recovery at the death*

of the deceased, or whether, upon the death of those then entitled, the cause of action survives, and reverts in the next of kin in the line of distribution.

At page 372 the court said:

> "We think the exclusive statutory beneficiary was that person or class of persons who were entitled to the recovery at the death of deceased, when the cause of action accrued. In this case it was the widow, and, in the language of the statute, the right of action passed to her, or to the administrator, for her benefit. The right of recovery having once vested in the widow, it did not pass upon her death to her personal representative, neither did it revest in the next of kin of deceased, for the reason that no provision is made in the statute for such contingency. The cause of action, upon the death of the person to whom it survived, or for whose benefit it might be prosecuted, was thereby extinguished."

In closing the opinion the court said (page 372):

> "Had there been no widow and children at the death of the intestate, the right of action would have passed to the father, or rather to the personal representative, for the benefit of the father, or in the event the deceased left no father surviving him, the suit would be prosecuted for the benefit of the next of kin living at the death of deceased. The right of action, however, does not pass to any person, or survive to any beneficiary, excepting those *appointed in the statute as entitled to the recovery when the cause of action accrued.*" (Italics ours.)

A case of importance because the opinion was delivered by a distinguished jurist, Justice Lurton, then a Circuit Judge, is *Sanders' Admr. v. L. & N. R. Co.*, 111 Fed. 708, in which the Circuit Court of Appeals of the Sixth Circuit, Judges Lurton, Day and Severens, passed upon the death statute of Tennessee in an action for the death of plaintiff's intestate. The father of deceased was entitled to the sole benefit of any recovery in the case, but the father died during the pendency

of the suit. The court held that the cause of action abated with the death of the beneficiary. In delivering the opinion of the court Judge Lurton said, page 709:

> "The next of kin for whose benefit the right of action survives are the real plaintiffs, and the administrator, though made a necessary party plaintiff by the statute, is nevertheless a mere trustee and a nominal party. *Webb* v. *Railway Co.*, 88 Tenn. 119, 128, 12 S. W. 428; *League* v. *Railroad Co.*, and *Railway Co.* v. *Lilly*, cited above; *Railway Co.* v. *Hooper*, 35 C. C. A. 25, 26, 92 Fed. 820. * * * *Inasmuch as the right of action survives only for the benefit of the beneficiaries designated in the statute, it is essential that the plaintiff's declaration show that the suit is brought for the use and benefit of a statutory beneficiary in existence when the right of action accrued.*" (Italics ours.)

Hammond v. *Lewiston, A. & W. Ry.*, 106 Maine, 209, 76 Atl. 672, was a suit by an administrator for damages resulting from the death of plaintiff's intestate, brought for the benefit of his sister. Deceased left a widow, who died before the suit was brought. The only question before the court was whether the action could be maintained for the benefit of the sister.

The controlling provisions of the Maine statute for death by wrongful act, as quoted by the Supreme court, p. 673, are as follows:

> "SEC. 10. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of his widow, if no children, and of the children, if no widow, and if both, then of her and them equally, and if neither, of his heirs. * * *"

The court said:

> "In other words, the plaintiff's position is that the administrator is given a right of action in any event, and the beneficiaries should be determined, not as

of the date of the death, but of the recovery. Such a construction cannot be adopted. * * *

"The language of the statute under consideration is plain and unambiguous. Some beneficiary named therein must exist at the time of the death of the deceased, otherwise no right of action arises. The suit is not for the benefit of the estate, and creditors have no interest in it. True, such suit is brought in the name of the administrator, but he is merely the nominal party and acts as trustee. The Legislature could have given the right directly to the widow or children or heirs, had it seen fit to do so, as the Legislatures of some states have done. But if none of the beneficiaries exists at the time of the death, no right of action is created. *Ea. Tenn. R. R. Co.* v. *Lilly*, 90 Tenn. 563, 18 S. W. 243; *Cooper* v. *Shore Electric Co.*, 63 N. J. Law, 558, 44 Atl. 633; *Topping* v. *St. Laurence*, 86 Wis. 526, 57 N. W. 365. * * *

"Under section 10, the party for whose benefit the action is brought depends upon the nature of the family that is left and four different conditions are provided for. * * * But in any event the immediate, absolute, and final vesting of the right occurs at the time of the decease, not at the time of bringing suit or of recovery. The beneficiaries have a right of action then or not at all and the facts of each particular case determine which beneficiaries have the right. If there is a widow as here, she has the sole and exclusive right. It belonged to her immediately upon the death of her husband and could not be transferred to any other beneficiary either by her death or failure to bring suit. The statute provides for several possible claimants, but the facts in each case determine which of them is the actual and sole claimant. There is no life interest in the widow with a remainder over to the heirs at law. One action is granted, not several. When the husband died the sister had no cause of action, and the death of the widow has not given her one. * * *

"Again the cause of action accrues at death by the very terms of the statute. The last clause of section 10 makes the two year limitation within which suit can be brought, begin at that time. Whoever has a cause of action under this statute has two years

> within which to bring it. Can it be that if a widow is left who survives her husband one year and eleven months, the heirs would then have a right of action but only one month in which to enforce it? The absolute vesting of the right in some beneficiary at time of death is further apparent from the fact that the damages vary according to the relationship of the deceased to the beneficiary and the dependence of the latter upon the former. 'The injury for which damages can be recovered must be wholly to the beneficiaries themselves and limited to the pecuniary effect of the death upon them.' *McKay* v. *Penobscot Co.*, 92 Me. 454, 43 Atl. 29. The pecuniary effect of the death of a husband upon his widow, and therefore the damages recoverable in an action for her benefit would differ materially from the pecuniary effect of his death upon remote heirs at law, and from the damages recoverable by them."

Dillon v. *C. C. C. & St. L.*, 34 Ind. App. 52, 72 N. E. 271, was a suit by an administrator under the Indiana statute to recover damages for the death of plaintiff's intestate, who left surviving a widow and three brothers. The widow died while the suit was pending and attempt was made to carry it on for the benefit of the brothers.

The court said at page 273:

> "The action must be brought, and must be maintained to the end, by the personal representative of the person for whose wrongful death the damages are sought. He pursues the remedy, not for the benefit of his decedent's estate, but as a convenient trustee specially designated by the statute to recover and distribute the damages for the beneficiaries recognized as such by the statute. Of these there are two classes: First, the widow and children, if there be such persons; and, second, other persons who are next of kin to the person, for whose wrongful death the action is maintained. If there be persons entitled to damages of this first class, the damages would be awarded for the exclusive benefit of such persons. Persons of the second class would not be entitled to damages, and there could be no recovery for their

> benefit, if there were persons entitled of the first class. The right of action accrues upon the death of the intestate. The widow of the appellant's intestate survived him, and there being no children, the right of action existed for her benefit alone, and there never was any right of action for the benefit of the brothers or 'next of kin' of the intestate."

Since the first decision of the Supreme Court of Minnesota in this case the Supreme Court of Louisiana has construed a statute of that state which is similar to the Federal Employers' Liability Act, in the case of *Kerner et al. v. Trans Mississippi Terminal R. Co.*, 158 La. 853, 104 So. 740, referred to in the *per curiam* opinion of the Minnesota Court. (R. 112.) The suit was for damages for the death of plaintiff's brother, who was survived by his mother and the plaintiffs' in the suit, a brother and five sisters. Under the Louisiana code the mother alone had a prior right of action for damages for his death. She brought suit but died before it was tried. Thereafter the brother and sisters brought suit. The Supreme Court of Louisiana held that in accord with the language of the statute, necessary implication, and the general rule, such a right of action is abated by the death of a person having the right; that the statute declared that the right of action accrued to brothers and sisters only in cases where there was no surviving spouse or child or parent; that the right of action belongs to the preferred survivors only, to the exclusion of any and all other survivors, and that if one of the survivors, who has thus acquired the right of action, dies afterwards, his death does not confer the right of action upon any other survivor; that the right of action is not transmissible from one survivor to another by virtue of the statute.

The Louisiana court points out the difference between

statutes like the original Lord Campbell's Act wher
beneficiaries are entitled to recover jointly, from sta
utes where beneficiaries are placed in different classe
one class not being entitled to recover as long as ther
are members of a preceding class. Where the bene
ficiaries are entitled to recover jointly the death of on
beneficiary in no way affects the right of the other bene
ficiaries to recover; but where the beneficiaries are i
different classes a right of action does not arise in th
succeeding class because of the death of the members o
the preceding class.

In *Frazier v. Georgia Railroad & Bank Company*, 9
Ga. 785, 22 S. E. 936, decided in 1895, the Supreme Cou
of Georgia, under a statute providing that "a mother, o
if no mother, a father, may recover for the homicide of
child," held that where the mother was living at the tim
of the death of the minor child, but she died prior t
bringing an action, the father of the child could n
bring an action for the death of the child.

In *Schmidt v. Menasha Woodenware Co.*, 90 Wis. 28
74 N. W. 797, the Wisconsin Court held that an action fo
death by wrongful act abates on the death of the pr
ferred beneficiary although a beneficiary of a more re
mote class survives.

In *Walton & Co. v. Burchel*, 121 Tenn. 715, 121 S. W
391, where a father and son were killed in the same acc
dent it was held a question of fact for the jury whethe
the father survived the son an appreciable period o
time; if he did, no recovery could be had in behalf of th
mother for the death of the son; if the father did no
survive, then recovery might be had for the mother.

In *Harvey v. Baltimore & O. R. Co.*, 70 Md. 329, 17 A
88, under a statute providing that action for death sha
be brought in the name of the state for the benefit of th

wife, husband, parent or child, it was held that where the husband died pending an action to recover damages in his behalf for death of his wife, the action could not be prosecuted in behalf of the children of deceased.

Wilcox v. *Warren Construction Co.*, 95 Or. 125, 186 Pac. 13, was an action for death under the Employers' Liability Act of Oregon. Deceased left surviving him his widow, who at the time was insane, and who died three months after he had been killed. The two plaintiffs were his minor children by a former wife. The Court held that the Oregon Liability Act gave priority to the widow if any, and, if none, a right of action to the children, and said:

> "The widow having been invested with a cause of action by the death of her husband, was at liberty to prosecute it or not. If she did, she was under no obligation to divide the proceeds with any of the decedent's other relatives. If she did not prosecute, either in her own proper person or by guardian, her cause of action died with her and did not pass to another, being personal to herself."

Although dissenting on the proposition that the Oregon statute separated the beneficiaries into distinct classes, Judge Bennett agreed that remote beneficiaries have no interest after the death of the first beneficiary, saying:

> "It seems to be well settled under the authorities that where the beneficiaries are grouped in different groups, and one group is given preference over another group, that the first group takes, to the exclusion of the latter one, and that, upon the death of all of the former group, the liability is extinguished."

In 8 Ruling Case Law, page 769, Section 52, it is said:

> "By the great weight of authority if the beneficiary first entitled to sue fail to bring the action, this will not transfer the right of action to other persons for whose benefit the action might have been maintained if the person first entitled had not been

> living when the right of action accrued. The reason for this view is that the statutes giving the right of action to specified persons are construed to create a single cause of action, which accrues immediately on the death of the decedent, and exists for the exclusive benefit of the beneficiary in whom the action vests, so that it cannot be transferred to any other beneficiaries by the death or failure of the first beneficiary to sue, since there never was any right of action for their benefit, in the absence of statute providing for such contingency."

In 17 Corpus Juris, p. 1232, section 78, it is said:

> "If a sole beneficiary or all the beneficiaries entitled at the time of decedent's death die, the right of action is extinguished; it does not pass to beneficiaries of the next class who would have been entitled to it if no one of the prior classes had survived the decedent."

It will be noted how frequently in the foregoing cases the courts have referred, in one way or another, to three propositions: *first*, that the right of action *accrues at the time of death*, *second*, that the administrator is but a *nominal party*, acting as trustee; and *third*, as said by Justice Lurton in the Saunders case, that those for whose benefit the right of action is given are the *real plaintiffs*.

In *Reading Co.* v. *Koons, Admr.*, decided April 12, 1926, (No. 213 Oct. Term, 1925) this court held that the cause of action under this statute *accrues at the date of death*, so that the limitation runs from that time; that the administrator *acts only for the benefit* of the persons specifically designated by the statute, who are identified persons for whose benefit the liability exists, and that *at the death of decedent there are real parties in interest*. In *Chicago, R. I. & P. Ry. Co.* v. *Schendel, Admr.*, decided the same day (No. 683 Oct. Term, 1925) this court held that suit by an administrator under the Federal Act was barred by judgment in another action against

the beneficiary, for the reason that, although the parties were not the same, the right to be enforced under the Federal Act in the suit by the administrator was the *right of the widow* and she was the real party in interest.

Thus the cases holding that, under similar statutes, the right of action accrues at the time of death to the beneficiary then entitled, and to the exclusion of more remote beneficiaries, are in accord with the decisions of this court as to the character of the rights created by such statutes, the time of their accrual and the persons in whom they vest.

III.

THE OPINION OF THE SUPREME COURT OF MINNESOTA IS NOT ONLY IN CONFLICT WITH "THE NUMERICAL WEIGHT OF AUTHORITY," AS IT ADMITS, BUT ENTIRELY DISREGARDS THE MEANING AND EFFECT OF THE WORDS "IF NONE" IN THE ACT.

The Supreme Court of Minnesota said:

> "We reach a different conclusion, though the numerical weight of authority accords with the Trial Court's ruling."

The Supreme Court of Minnesota relied upon two cases construing state statutes, one from South Carolina and the other from Ohio.

In *Morris v. Spartanburg R. G. & E. Co.*, 70 S. C. 279, 49 S. E. 854, the South Carolina Court disposed of the question in a short opinion, referring to but one case and that its own prior decision. The following remarkable statement is found in this opinion:

> "the award of damages for the wrongful death is the important matter; the manner of distribution is of secondary consideration."

Under such statutes the manner of distribution is of controlling importance; liability depends upon the existance of the specified beneficiaries.

This statement of the South Carolina Court plainly disregards the controlling words of the statute: "*if none*," which the court brushed aside under the guise of "liberal construction." It is an ancient doctrine of this court that where the language of a statute presents no ambiguity the court will not attempt to qualify the meaning by construction. (*Doe* v. *Considine*, 6 Wall. 458.)

Another curious feature of the South Carolina case is that although the father of deceased was referred to as the preferred beneficiary, he brought the suit as administrator *for the benefit of all the heirs at law of deceased* and the court said, in substance, that as all the brothers and sisters were named in the complaint the action should not abate for want of beneficiaries. Apparently this irregularity influenced the decision.

In the Ohio case on which the Minnesota court also relied (*Garrard* v. *Mahoning Valley Ry. Co.* 100 Ohio St. 212, 126 N. E. 53), the trial court and the Ohio Court of Appeals had held that the action did not survive the death of the widow for the benefit of the parents, but the Supreme Court of Ohio brushed aside the authorities with the statement that the decisions of other states brought to its attention were of little assistance because they merely construed particular statutes under consideration, and, said in substance, that it proposed to construe the Ohio statute to suit itself. The Ohio court stressed the idea that the cause of action vested in the administrator, saying:

> "By force of the statute the right to enforce the liability is not placed in the beneficiary."

and held that therefore it was the intention of the

legislature to provide an existing class of beneficiaries who should respond at the time the administrator instituted his suit. The Minnesota court adopted this theory of the Ohio court, stating (R. 26) that the Federal Act vests the right of action in the personal representative, and that under the Federal Act the beneficiary cannot sue.

This view is not in accord with the weight of authority or with the view of this court, as expressed in the recent cases of *Reading Co.* v. *Koons, Admr.*, and *Chicago, R. I. & P. Ry. Co.* v. *Schendel, Admr.*, hereinabove referred to. In the *Schendel* case this court reversed the Supreme Court of Minnesota on the very question of interest of an administrator under the Federal Act, this court holding that the administrator is but a nominal party while the beneficiary is the real party in interest.

In the *Koons* case this court said:

> "For while it is true that the executor or administrator is the person authorized to bring the suit, he nevertheless acts only for the benefit of the persons specifically designated in the statute. At the time of the death there are identified persons for whose benefit the liability exists and who can start the machinery of the law in motion to enforce it, by applying for the appointment of an administrator. This court has repeatedly held that a suit brought by such persons in their individual capacity is not a nullity within the provisions of the Act, and that if by amendment the plaintiff is properly described as executor or administrator of the decedent, even though the amendment is had after the expiration of the statutory period, the suit may be maintained and a recovery had under the statute. (Citing cases.) Thus at the death of decedent, there are real parties in interest who may procure the action to be brought; and there are no such practical inconveniences or necessary delays as would lead to the conclusion that the word 'accrued,' as used in the statute, can not be taken to refer to the time of death."

In this case the cause of action accrued at the time of Anderson's death. His mother was the person specifically designated in the statute; she was the identified person for whose benefit the liability then arose and existed; she was the real party in interest. What becomes of the two-year limitation, if another cause of action and with a different measure of damages accrues to the sister long after the death of the employee? The limitation, running from the time of death, precludes the possibility of the statute creating new causes of action for successive beneficiaries in turn.

When the cause of action accrued at Anderson's death the sister admittedly had no interest in it; having no interest under the statute, she could not acquire it otherwise; certainly not by or through the death of some other person.

IV

IF CONGRESS HAD INTENDED THE RESULT REACHED BY THE SUPREME COURT OF MINNESOTA, IT WOULD HAVE SAID SO.

The Federal Employers' Liability Act differs from Lord Campbell's Act and the statutes of some of the states, under which the right of action vests at once for the benefit of all beneficiaries, and damages are apportioned by the jury, or under the statutes of descent. (See *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, note page 69; *Woodward v. C. & N. W. Ry. Co.*, supra; and *Hammond v. L. & I. & W. S. R. Co.*, supra.)

This Court pointed out the distinction between the Federal Act and the Texas statute in *St. Louis Southwestern Railway v. Seale*, 229 U. S. 156, p. 158:

> "The Texas statute gave the right of action to the 'surviving husband, wife, children and parents'

> and provided that it might be enforced by all of them or by one or more for the benefit of all, while the Federal statute vested the right of action in the deceased's 'personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next kin dependent upon such employe.''

By special statutory provision in Texas the amount recovered is divided among the beneficiaries who shall be living at the time of distribution. (*Houston & Texas C. Ry. Co.* v. *Moore*, 49 Tex. 31), and a Missouri mining statute specifically provides that where the widow dies within the period of limitations, the children may take (*Poor* v. *Watson*, 92 Mo. App. 89).

In some states, as Colorado and North Dakota, the statutes create distinct classes of beneficiaries but provide specifically that if the beneficiary of a class entitled does not exercise the right of action within a given time, the next class, after due notice, may be substituted. (*Hackman* v. *Northern Pac. Ry. Co.* 14 N. D. 69, 103 N. W. 412, *Hopper* v. *Denver & R. G. Co.* 155 Fed 273.)

The Alaska Code, hereinafter referred to, gives the right of action for the benefit of the *estate* of deceased.

These special statutory provisions giving rights to remote classes of beneficiaries, where there are preferred beneficiaries, emphasize the necessity of such positive enactments.

In enacting the Federal Employers' Liability Act, it must be assumed that Congress was familiar with the celebrated Lord Campbell's Act, which, as said by Justice Lurton in *Michigan Cent. R. Co.* v. *Vreeland*, supra, ''was the first act which ever provided for a cause of action arising out of the death of a human being, * * * and has been, in its distinguishing features, re-enacted in many of the states. * * *.''

Also it is to be assumed that Congress was famili
with different state statutes.

Statutes on death by wrongful act with priority clas
fication of beneficiaries, like Congress adopted in t
Federal Employers' Liability Act, had been in effe
many years prior to the passage of that act, and had be
construed in well reasoned opinions. The leading ca
of *Woodward v. Chicago & N. W. Ry. Co.*, 23 Wis. 4
above referred to, was decided in 1868. *Beach v. Louisv
& N. R. Co.*, 94 Tenn. 388, 29 S. W. 370, was decided
1895. Justice Lurton's opinion in *Sanders v. Louisv
Louisville & N. R. Co.*, 111 Fed. 708, was in 1901. T
Indiana case, *Dillon v. C. C. C. & St. L. Ry. Co.*, 32 N.
271, was decided in 1904.

At the time the Federal Employers' Liability Act w
passed in 1908, it was settled by the great weight of a
thority, that if a statute creates distinct classes of be
ficiaries, to-wit: beneficiaries living at the time of the
death of a preferred beneficiary for whose benefit t
cause of action has accrued at the death of the injur
person. Congress had authoritative construction of t
language which it selected for the Employers' Liabil
Act.

The fact that Congress did not adopt Lord Campbell
Act literally, but changed the language relating to be
ficiaries, manifests a plain intention of Congress to g
effect to whatever change of meaning that really result
therefrom. A change in phraseology creates a presum
tion of a change in intent. *Crawford v. Burke*, 1
U. S. 176, 180.)

The fact that Congress did not adopt the statutes
New York, Pennsylvania, Texas or other states wh
give an action for death for the benefit of all survivi
relatives, the proceeds to be distributed according to

laws of descent, indicates that it did not intend such distribution.

It did not adopt a statute like Colorado or North Dakota, specifically providing for substitution of a remote beneficiary, if the first beneficiary failed to enforce his or her cause of action.

If Congress had intended any such result as has been reached by the Supreme Court of Minnesota in this case, "it would have been easy to have said so," applying the familiar expression of this court in cases where efforts have been made to change the plain meaning of statutes. (*Tillson* v. *U. S.*, 100 U. S. 43, 46, *Baltimore & O. R. Co.* v. *Grant*, 98 U. S. 398, 403, *United States* v. *Detroit First N. Bank*, 234 U. S. 245.)

Congress having adopted the form of statute creating classes of beneficiaries, we respectfully submit that the authoritative construction of such statutes in the states where same had been in force for many years ought to be applied to the Act of Congress. It is a familiar rule that where a state statute is literally or substantially adopted by Congress, the judicial construction already placed upon it by the courts of the state where it originated accompanies the statute and is to be treated as incorporated therein. (*Capital Traction Company* v. *Hof*, 174 U. S. 1, 36; *Willis* v. *Eastern Trust Co.*, 169 U. S. 295; *Metropolitan R. R. Co.* v. *Moore*, 121 U. S. 558.)

In *Jennings* v. *Alaska Treadwell Coal Mining Co.* 170 Fed. 146, the Circuit Court of Appeals, Ninth Circuit pointed out that in enacting Sec. 353 of the Alaska Code (31 Stat. L. 392) giving an action for death by wrongful act, Congress adopted Sec. 381 of the Oregon Code; that two years before the adoption of the Alaska Code by Congress the like section of the Oregon Code had been construed by the Supreme Court of

Oregon, and the Circuit Court of Appeals applied the construction of the Oregon statute, by the Oregon court, to the section of the Alaska Code, under the principle that such construction was presumed to have been adopted with the statute, citing a large number of authorities.

V

THE EVIDENCE DID NOT ESTABLISH DEPENDENCY NECESSARY TO ESTABLISH A CAUSE OF ACTION UNDER THE FEDERAL ACT.

This judgment is in favor of a sister claiming as a beneficiary of the third class, "next of kin, dependent." Beneficiaries of the first and second class need show only reasonable expectation of support (*Mich. Cent. R. Co. v. Vreeland*, 227 U. S. 59), but to establish a right of action for a sister, actual dependency must be shown. (*M. Coll[illegible] v. Chicago, R. I. & P. Ry. Co.*, 100 Ia. 624, 142 N. W. 67; *Moffett v. Baltimore & O. R. Co.*, 229 Fed. 39; *Smith v. Price*, 195 Mo. App. 259, 190 S. W. 69; *Dooley v. Seaboard A. L. R. Co.*, 163 N. C. 454, 79 S. E. 970.)

In *Southern R. Co. v. Vessel*, 102 Ala. 140, 68 So. 336, it was held that a married sister of a deceased employee was not dependent, merely because she had a moral claim upon deceased or because he had been paying her regularly for her board.

In *Beattie v. Northern Pac. Ry.*, 60 Wash. 552, 111 Pac. 788, in passing on a claim by parents for the death of an adult son, under a statute conferring a right of action only on those dependent upon deceased, the court said:

> "This evidence does not, in our opinion, establish such a support or dependency as is contemplated by the statute. It shows nothing more than such gifts

as countless sons occasionally bestow upon their parents, with no thought of dependency, nor that it is a gift of necessity. Our statute means something more, while we would not give it such a strict construction as to say it means wholly dependent, or that the parents must have no means of support or livelihood other than the deceased, such a construction being too harsh and not in accordance with the humane purpose of the act. Nevertheless, there must be some degree of dependency, some substantial dependency, *a necessitous want on the part of the parent, and a recognition of that necessity on the part of the child.* Such we believe to be the general interpretation of like statutes.

"In *Darnell* v. *Hunt*, 34 Fla. 85, 15 So. 876, it is said:

'We think that when the suit is brought by a person who bases his right to recover upon the fact that he is dependent upon the deceased for support, then he must show, regardless of any ties of relationship or strict legal right to such support, that he or she was, either from the disability of age, or non age, physical or mental incapacity, coupled with a lack of property means, dependent in fact upon the deceased for a support. There must be, when adults claim such dependency, an actual inability to support themselves, and an actual dependence upon someone else for support, coupled with the reasonable expectation of support, or with some reasonable claim to support from deceased.'

"The evidence here does not bring respondents within the statute. They were in no sense dependent upon the deceased for support. The father was able to follow a daily vocation, and if his earnings only resulted in an average income of $40.00 per month, that was the result of his inability to sell more goods, and not his inability to solicit the sale. His necessity must not be judged from his unsuccessful effort to make a larger income, but from his physical ability to make the effort. Neither does an occasional contribution from a son to a parent establish a condition of dependency. There must be a substantial need on one side and a substantial financial recognition of that need on the other side, to

make out a dependency within the meaning of this statute."

By the weight of authority, evidence of contributions, where there is no evidence of actual necessity on the part of the beneficiary or where the evidence tends to show that the beneficiary was not actually dependent upon the deceased, does not show dependency within the statute. (*Trammell* v. *Southern R. Co.*, 182 Fed. 789; *Southern R. Co.* v. *Vessell*, 192 Ala. 440, 68 So. 336; *Atlantic Coast Line R. Co.* v. *McDonald*, 135 Ga. 635, 70 S. E. 249; *Georgia R. & B. K. G. Co.* v. *Sparks*, 111 Ga. 574, 36 S. E. 855; *Hoitnatt* v. *Boston & A. R. Co.*, 156 Mass. 86, 30 N. E. 224; *Bartle* v. *N. P. R. Co.*, *supra*.)

Where dependency and contributions are both essential elements to the right to recover, if one of these elements is lacking, no recovery can be had.

Smith v. *Hatcher*, 102 Ga. 158, 29 S. E. 162.

In *Illinois Central R. Co.* v. *Doherty's Admr.*, 153 Ky. 763, 155 S. W. 1119, an action by an administrator for the benefit of brothers and sisters of a deceased, the evidence disclosed that deceased left surviving him several brothers and two sisters, one a Sister of Charity, residing in a convent, who received no support from the decedent in his lifetime, and the other a married woman living in Ireland. There was some testimony that the decedent had borrowed money to send to his sister in Ireland, but whether the money was sent for the payment of a debt or for the support of the husband. No creditor was introduced to show that she resided in Ireland was unable to support herself. There was no evidence that any of the brothers were dependent upon the deceased. The Court held there could be no recovery under the Federal Act.

In this case there was no claim of want or necessity on the part of the sister. She is an intelligent, able bodied woman, of mature years, mentally and physically able to take care of herself. For six years she had done so, working in clerical positions in Chicago. After the death of the mother and brother, the sister returned to work in Chicago where she was working at the time of trial. She was not thrown upon the support of her brother by necessity or misfortune, but in 1917 merely changed her employment. Apparently the deceased brother had assumed full responsibility for the care of the aged and invalid mother, living in her home but keeping it up and supporting her out of his earnings. He needed a housekeeper; the mother needed care. The brother went to Chicago and by promising the sister "more money than she could earn in Chicago", induced her to give up her position in Chicago and take the job of housekeeping for him. Of course natural affection and sympathy for her infirm mother must have influenced her to some extent, but has nothing to do with the question of dependency on her brother. What she did for her brother was compensated for in money. He had never given her any money prior to the time she went back to Iowa to keep house for him and if she had stayed in Chicago he would not have given her anything. The payments were made regularly, twice a month. She was dependent on her brother only in the sense that any employee is dependent upon the employer while the relation continues. Her arrangement with her brother was terminated by his death and was not of a character which constitutes a legal basis for a cause of action under the Federal Employer's Liability Act. The trial judge said that the question was not free from doubt (R., 100), although he

did not feel warranted under the Minnesota practice in setting aside the verdict.

We respectfully submit that this petition be granted and the judgment reversed.

DENEGRE, McDERMOTT & STEARNS,
J. A. CONNELL,
J. C. JAMES,
Attorneys for Petitioners.

BRUCE SCOTT,
Of Counsel.

IN THE

Supreme Court of the United States

October Term, 1925

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Petitioner,

vs.

WELLS-DICKEY TRUST COMPANY, as Special Administrator of the Estate of Elmer E. Anderson, Deceased,

Respondent.

To *Messrs. Miner & McDonald,*
Attorneys for Respondent,
Minneapolis, Minnesota.
Messrs. Taatjes & Wilder,
Attorneys for Respondent,
Minneapolis, Minn.

Please take notice that the foregoing petition and supporting brief, together with printed record herein, a copy of which is served herewith, have this day been filed with the Clerk of the Supreme Court of the United States for submission to said Court for its consideration and action on the first motion day following the expiration of two weeks from the date of service of this notice.

Dated April , 1926.

Dunlgie, McDermott & Stearns,
J. A. Connell,
J. C. James,
Attorneys for Petitioner.

Bruce Scott,
Of Counsel.

We acknowledge service of copy of the foregoing petition, brief and notice, together with a copy of the printed record thereon referred to.

Dated, , 1926.

Attorneys for Respondent.